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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Charlie Gahn, dba Olde Tymers Restaurant,)
9 Plaintiff,) CV 03-630 TUC DCB
10 v.)
11 Columbia Casualty Insurance Company, et al.,) **ORDER**
12 Defendant.)
_____)

13 This action was filed on November 28, 2003, in state court. Plaintiff sought to
14 compel arbitration of an insurance claim. The case was removed to this Court on December
15 24, 2003. The Court ruled on August 19, 2004, that the dispute was subject to an arbitration
16 clause as follows:

17 If we and you disagree on the value of the property or the amount of the
18 loss, either party may make written demand for an appraisal of the loss. In
19 this event, each party will select a competent and impartial appraiser. The
20 two appraisers will select an umpire. If they cannot agree, either may
21 request that selection be made by a judge of a court having jurisdiction.
The appraisers will state separately the value of the property and amount of
loss. If they fail to agree, they will submit their differences to the umpire.
A decision agreed to by any two will be binding. . .

22 (Complaint at ¶ XIII.) Pursuant to the Federal Arbitration Act, the Court ruled to enforce the
23 arbitration clause and stayed the case, pending arbitration in accordance with the contract.
24 Specifically, the Court granted the Plaintiff's Motion to Compel Appraisal and Appointment
25 of Appraiser and denied the Defendant's Motion to Dismiss or in the Alternative Motion for
26 Summary Judgment.
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1 On December 23, 2004, the Defendant filed a Motion to Vacate or Modify the Stay
2 and a Motion for Summary Judgment, arguing that the Plaintiff breached the policy's
3 cooperation clause.

4 On February 22, 2005, the Court found the Defendant's motions were a re-hash of
5 its arguments presented in opposition to the Motion to Compel the Appraisal. The Court
6 noted that it appeared that the parties were at odds regarding the appointment of their
7 respective appraisers, but that it had not received a motion to disqualify the Plaintiff's
8 appraiser as impartial in spite of Defendant's assertion that such a motion was being
9 simultaneously filed with its request to lift the stay and motion for summary judgment. The
10 Court denied both. The Court reminded the Plaintiff that if he refuses to disclose information
11 that is necessary for appraisal of loss by the designated appraisers, it would entertain the
12 Defendant's reurging of its motion to vacate the Order of appraisal and allow Defendant to
13 file its motion for summary judgment.

14 On June 20, 2005, the Defendant filed the Motion to Disqualify the Plaintiff's
15 appraiser. Defendant's assertion that Plaintiff's appraiser, Mr. John Hall, is not disinterested
16 nor impartial is based on Plaintiff's agent, Mr. O'Toole's, refusal to respond to a subpoena for
17 information regarding his relationship with Mr. Hall. On August 16, 2004, Mr. O'Toole had
18 responded that it would be too burdensome and time consuming and would raise
19 confidentiality and privacy concerns to provide the requested information, which was:

20 All written records of any nature identifying how much money has been
21 paid by [O'Toole,] [his] firm, or his clients (insured for whom [h]e adjusted
22 claims) to John Hall in the past 5 years for his services as an appraiser on
23 behalf of an insured.

24 All written records of any nature identifying the percentage of claims
25 adjusted by James F. O'Toole Company, Inc. in the past 5 years in which
26 James F. O'Toole Company, Inc. employs, recommends, nominates or
27 appoints John Hall as an appraiser, identifying specifcally the number of
28 claims in which an appraiser has been employed, recommended, nominated
or appointed and the number of claims in which that individual is John Hall.

(Defendant's Motion to Disqualify at Ex. 4: March 15, 2005, 1 at 4, ¶27.)

1 Defendant argues that O'Toole's responses demonstrate there is a relationship
2 between Hall and him, and that he is unwilling to disclose such information.

3 On July 18, 2005, Mr. Hall prepared an affidavit attesting to his impartiality and
4 disinterest in the case. Specifically, Mr. Hall attests that he has no financial stake in the
5 outcome of the Old Tymers appraisal, and that he is paid hourly by the insured and not on
6 a contingent fee or on any basis involving a percentage of the recovery by the insured. He
7 works for the insured individual in first-party claims being handled by public adjusters and
8 attorneys. He attaches a copy of his retainer agreement with Plaintiff Gahn, d/b/a Old
9 Tymers Restaurant.

10 In connection with the Old Tymers' appraisal, Mr. Hall attests that he was named as
11 the insured's appraiser on July 10, 2003. After the Defendant appointed Peter Moreno as its
12 appraiser, Mr. Hall contacted Mr. Moreno, sent him a copy of the claim information, the
13 parties to the appraisal documentation, and an umpire candidate list. He contacted Mr.
14 Moreno on May 5, May 17, and May 20, 2005, to follow-up to no avail. (Plaintiff's
15 Controverting Statement of Facts at Ex. B: Hall Affidavit.)

16 Plaintiff asserts that the Defendant fails to participate in the arbitration process, and
17 therefore, Plaintiff is entitled to summary judgment. Plaintiff asks the Court to appoint an
18 appraiser for the Insurer, Columbia Casualty, because Mr. Moreno is an employee of GAB
19 Robins, which acted as the Insurer's claims representative. *Id.*

20 Defendant clarifies that it employed Ned Derickson at GAB Robins to accumulate
21 information regarding the claim for Defendant. Mr. Derickson was not the adjuster on the
22 claim. The adjusters were Defendant's employees: Joe Nalepa and Gil Tognarelli. (D's SOF
23 at 44.) Mr. Derickson is no longer employed at GAB Robins. Mr. Moreno was a GAB
24 Robins employee. Like Mr. Derickson, he is no longer employed at GAB Robins. Mr.
25 Moreno is now employed at Crawford and Company. While at GAB Robins, he and Mr.
26 Derickson did not work together. They did not work in the same office. (D's SOF at Ex. 37:

1 Moreno Affidavit.) Mr. Moreno claims to have had no involvement and no knowledge
2 regarding the claim in the instant case.

3 Defendant challenges the veracity of Mr. Hall's attestations. Defendant has compiled
4 the following information regarding Mr. Hall's relationship with Mr. O'Toole. A search of
5 public records in California reflects the following information: 1) the James F. O'Toole
6 Company is the same person as the Plaintiff's agent and adjuster, Mr. O'Toole; 2) the
7 registered statutory agent for the James F. O'Toole Company is Mr. Hall; 3) an attorney, John
8 F Kunath, the statutory agent for, J. Arthur Corp., a corporation in which Mr. Hall has an
9 interest, also represented Mr. O'Toole in litigation in California. A search of court records
10 reflects several Arizona and California cases where Mr. O'Toole, Mr. Hall, and several of the
11 attorneys disclosed by Mr. Hall, worked in conjunction with each other as adjuster, appraiser,
12 and counsel of record. (D's SOF at 35.)

13 While Mr. Hall professes to be hired on an hourly basis, paid regardless of the
14 outcome, his invoice to Plaintiff Gahn, dated September 9, 2004, reflects zero payments. If
15 he was hired as early as July 10, 2003, fourteen months passed without payment.
16 Additionally, Defendant notes that the letter of retention between Hall and Gahn is dated
17 September 9, 2004.

18 Conclusion:

19 Under the terms of the insurance contract, the parties must select competent and
20 impartial appraisers. The two appraisers will select an umpire. If the appraisers cannot agree
21 on an umpire, either may request that selection be made by this Court. The appraisers will
22 state separately the value of the property and amount of loss. If they fail to agree, they will
23 submit their differences to the umpire. A decision agreed to by any two will be binding.

24 Based on the evidence uncovered by the Defendant regarding the relationship
25 between Mr. O'Toole and Hr. Hall, the Plaintiff has failed to comply with the provision to
26 select a competent and impartial appraiser. The Court finds that a reasonable person would,
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1 based upon the appraiser's history and past actions, objectively entertain doubts about Mr.
2 Hall's neutrality. *See* (Plaintiff's Response at 10 (citing *Banwait v. Hernandez*, 205 Cal. App.
3 3rd 823 (3rd Dist. 1988)).¹ Plaintiff has 10 days to select an impartial appraiser and file a
4 notice of that selection with the Court.

5 Given the excessive delay that is occurring in the arbitration of this matter, the Court
6 sets a schedule for the arbitration of this matter, including the immediate selection of an
7 umpire to oversee compliance with the schedule.

8 **Accordingly,**

9 **IT IS ORDERED** that defendant's Motion to Disqualify Plaintiff's Appraiser
10 (document 42) is GRANTED.

11 **IT IS FURTHER ORDERED** that within 15 days of the filing date of this Order,
12 the Plaintiff shall select an impartial appraiser and file his or her name with this Court.

13 **IT IS FURTHER ORDERED** that within 5 days of the Plaintiff's filing this notice
14 with the Court, the Defendant shall file any objection. In the event no objection is filed, the
15 Plaintiff's appraiser shall be as named and Defendant's appraiser shall be Mr. Moreno.

16 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Appointment of an Umpire
17 (document 47) is GRANTED.

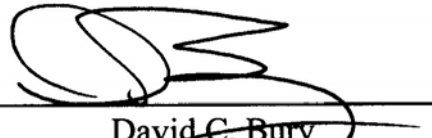
18 **IT IS FURTHER ORDERED** that within 10 days of appraisers being named for
19 both parties, the appraisers shall provide the Court with the name of an umpire to be
20 appointed in this case. In the event the appraisers can not agree to an umpire, each appraiser
21 shall file a list of ten names of proposed umpires. Objections shall be filed within five days.
22 Thereafter, the Court shall select an umpire for appointment in this case.

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25 ¹*See also:* http://commerce.appraisalfoundation.org/html/USPAP2005/ethics_rule/htm
26 Uniform Standard of Professional Appraisal Practice (USPAP), Conduct (appraiser must perform
27 assignment with impartiality, objectivity, and independence, and without accommodation of
28 personal interests.)

1 **IT IS FURTHER ORDERED** that the umpire shall file status reports with this
2 Court every three months, commencing on the date of his appointment.

3 **IT IS FURTHER ORDERED** that all other pending motions are DENIED.

4 DATED this 22nd day of November, 2005.

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9 David C. Bury
10 United States District Judge
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